for the district within which the suit was pending. *M. Hohenberg & Co. v. Mobile Liners. Inc.* (1917, S. D. Ala.) 245 Fed. 169.

See COMMENTS, p. 935.

SALES—BILLS OF LADING—RESERVATION OF TITLE.—The National Bank of Powell, Wyo., telegraphed to the plaintiff an offer to sell a car of potatoes at $1.35 per 100. Through a mistake in the transmission of the telegram it read when delivered: "Can furnish one car clean potatoes at *once* $.35 per 100 f. o. b. Powell." The plaintiff accepted the offer and the Wyoming bank shipped the potatoes, sending a bill of lading to a bank at St. Joseph, Mo., with draft attached for the amount of the sale at $1.35 per 100. The plaintiff tendered the amount due on a 35¢ basis both to the St. Joseph bank and to the carrier. Being unable to obtain possession of the shipment the plaintiff brought replevin against the railroad company. *Held,* that upon tender of the price according to the contract, the title and right to possession passed to the plaintiff, and that the action could be maintained. *J. L. Price Brokerage Co. v. Chicago B. & Q. R. R. Co.* (1917, Mo. K. C. App.) 199 S. W. 732. See COMMENTS, p. 932.

SALES—WARRANTIES—IMPLIED WARRANTY OF WHOLESOMENESS OF FOOD.—The plaintiff purchased and ate at the defendant's drug store ice cream manufactured by the defendant. In an action for damages for illness caused by the presence in the cream of tyrotoxican, a filth product, the trial court charged that the defendant impliedly warranted the cream wholesome and fit to eat. *Held,* that the instruction was correct. *Race v. Krum* (1918, N. Y.) 118 N. E. 853.

See COMMENTS, next month.

TORTS—ENTICING AWAY PLAINTIFF'S EMPLOYEE—JUSTIFICATION.—The defendant corporation induced an employee of the plaintiff corporation to leave the plaintiff in order to enter the service of the defendant. Under his contract with the plaintiff the employee in question was under no duty to remain. The plaintiff sought an injunction. *Held,* that the defendant had committed no legal wrong and that an injunction should be denied. *Triangle Film Corporation v. Artcraft Pictures Corporation* (1918, C. C. A. 2d) 59 N. Y. L. J. 283.

In spite of the *dictum* of Pitney, J., to the contrary in *Hitchman Coal & Coke Co. v. Mitchell* (1917) 38 Sup. Ct. 65 (commented on in [1918] 27 YALE LAW JOURNAL, 794-795), the decision in the principal case seems both sensible and sound. As Learned Hand, J., says in the course of his brief but illuminating discussion, "the result of the contrary would be intolerable both to such employers as could use the employee more effectively and to such employees as might receive added pay. It would put an end to any kind of competition." The learned court felt the contention of the plaintiff to be "so extraordinary" that it refused "to consider it at large" and apparently deemed it unnecessary to cite authorities. Actual decisions upon the point are in fact not numerous. See (1918) 27 YALE LAW JOURNAL, 794. The opinion of the court in the principal case is to be commended for its frank recognition that the decision really involved a determination of policy, viz., what shall be recognized as "just cause" for intentionally interfering with the "status" of employer and employee which existed between the plaintiff and the person induced to leave.

TORTS—NEGLIGENCE—LIABILITY OF CONTRACTOR TO THIRD PARTY.—The defendant corporation constructed a highway bridge under contract with county commissioners. Some years after the bridge had been accepted by the county, the appellant's decedent sustained fatal injuries from its collapse due, as the plaintiff alleged, to negligence in its construction. *Held,* that the complaint stated a good

cause of action. *Travis v. Rochester Bridge Co.* (1918, Ind. App.) 118 N. E. 694.

This case calls attention to the gradual passing of the old rule that a contractor is not liable to indeterminate third parties for injuries caused by defective construction because there is no privity of contract between them. See *Winterbottom v. Wright* (1842, Exch.) 10 M. & W. 109. The first departure from the old rule was made in the case of articles inherently dangerous to life or health. *Thomas v. Winchester* (1852) 6 N. Y. 397 (poison wrongly labelled). The character of the article imposed upon the maker a positive duty of care—a tort duty—not to deal with it so as to cause harm to any person who might reasonably be expected to use it; the lack of privity of contract could be no defense to a violation of this duty. *Waters-Pierce Oil Co. v. Deselms* (1908) 212 U. S. 159, 29 Sup. Ct. 270. Some courts extend the duty of care to include cases where the instrumentality was not dangerous in itself but was made so by defective construction. *Huset v. Case Threshing Machine Co.* (1903, C. C. A. 8th) 120 Fed. 865; *MacPherson v. Buick Co.* (1916) 217 N. Y. 382, 111 N. E. 1050; see also (1916) 25 YALE LAW JOURNAL, 679. But many courts have refused to go so far. Some hark back to the old and pointless objection of lack of privity, as though the sole liability were in contract for breach of implied warranty, and not equally in tort. See *Cadillac Co. v. Johnson* (1915, C. C. A. 2d) 221 Fed. 801. Other courts have argued that the doctrine would create a liability so indefinite as to expose industry to ruin through litigation. *Curtin v. Somerset* (1891) 140 Pa. 70, 21 Atl. 244. Indefiniteness, if an objection, would apply to any tort duty; the conclusion drawn from it seems to represent a mistaken view of fact and policy—it presupposes a prevalence of negligence which, if it exists, can best be remedied by making such negligence expensive. On the relation of the doctrine here discussed with that of liability for breach of warranty by a vendor, see p. 961, *supra*. As in the principal case, bridge contractors have been held liable for injuries caused to the traveling public by negligent construction, but the cases have always, so far as discovered, laid emphasis upon the fact that the defects in construction were known to the defendant and were concealed from the other contracting party as well as from the public. *O'Brien v. American Bridge Co.* (1910) 110 Minn. 364, 125 N. W. 1012. Whether there would be liability if the contractor had faithfully performed his contract and the injury were due merely to a defect in the plans which the contractor ought to have recognized as creating a structure dangerous to the public is a question which the principal case suggests but does not decide. Nor does it at all discuss the question of the defendant's knowledge of the defect: the case came up on demurrer to a complaint in which actual knowledge was alleged. Such actual knowledge is held in one group of cases essential to the defendant's liability. *Schubert v. Clark* (1892) 49 Minn. 331, 51 N. W. 1103; *Earl v. Lubbock* [1905] 1 K. B. 253. A second group holds "imputed" knowledge to be sufficient, but only when the circumstances are such as to warrant a jury in finding that the defendant *must have known* of the defect. *O'Brien v. American Bridge Co., supra*. Courts which follow this theory deny the defendant's liability where he only "should have known" or "ought to have known." *Wood v. Sloan* (1915) 20 N. M. 127, 148 P. 507. A third group holds that if the defendant *should have known*, he cannot escape because he did not know. *MacPherson v. Buick Co., supra*. The last rule, applying a purely objective test, seems to be more in accord with the general principles of tort liability.

TRADE-MARKS—APPLICATION TO DIFFERENT GOODS OF SAME CLASS.—The plaintiff was the registered owner of the trade-mark "Old Crow" which it had always applied to its straight rye and bourbon whiskey. It sought an injunction against the defendant's use of the same trade-mark on the defendant's straight